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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MARCELLOUS LEWIS, Defendant and Appellant.	A147849 (Alameda County Super. Ct. No. C163699A)

When Marcellous Lewis was between 15 and 17 years of age, he committed three forcible sex offenses, against two different victims (Crystal Doe and Sabrina Doe), and shot and killed a third victim (Robert Tibbs). Lewis was tried as an adult and convicted, by a jury, of the forcible sexual penetration (Pen. Code, § 289, subd. (a)(1))[1] and forcible rape of Crystal (§ 261, subd. (a)(2)), the forcible rape of Sabrina (*ibid.*), and the second degree murder of Tibbs (§ 187, subd. (a)). In 2011, the trial court sentenced Lewis to an aggregate sentence of 115 years to life.

In a prior appeal (*People v. Lewis* (2013) 222 Cal.App.4th 108 (*Lewis I*)), we affirmed Lewis's convictions but remanded "for the trial court to determine a parole eligibility date within Lewis's expected lifetime, unless it finds that Lewis's offenses reflect his irreparable corruption within the meaning of *Miller v. Alabama* [(2012) 567 U.S. 460]." (*Lewis I*, at p. 123.) On remand, the trial court held a resentencing hearing at which it considered extensive evidence on the youth-related factors outlined in

[1] Undesignated statutory references are to the Penal Code.

Miller, and again imposed an aggregate term of 115 years to life. Lewis appeals for a second time, arguing that the trial court abused its discretion in reimposing the sentence and violated his Sixth Amendment right to a jury trial. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

In November 2009, the court granted the prosecution's motion to consolidate two complaints against Lewis: one charging him with kidnap and forcible sex offenses against Crystal and Sabrina, and the other charging him with Tibbs's murder. In May 2010, the court held Lewis, a minor at the time of the crimes, to answer to the charges as an adult. (Welf. & Inst. Code, former § 707, subd. (d).)

In September 2011, Lewis was charged in an amended information with the murder of Tibbs (§ 187, subd. (a); count 1), sexual penetration with a foreign object upon Crystal (§ 289, subd. (a)(1); count 2), and rapes of Crystal and Sabrina (§ 261, subd. (a)(2); counts 3 & 4). In connection with the murder count, the information alleged Lewis personally and intentionally discharged a firearm and caused great bodily injury and death. (§§ 12022.53, subds. (b)–(d) & (g), 12022.7, subd. (a).) As to the sexual assault counts, the information alleged Lewis kidnapped his victims, and perpetrated offenses against multiple victims, within the meaning of the one strike law (former § 667.61, subds. (d)(2), (e)(5)).[3] The matter proceeded to a jury trial.

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[2] Our statement of the underlying facts is taken primarily from our *Lewis I* opinion. Although we originally deferred ruling on the People's request for judicial notice of the record in Lewis's prior appeal, we now grant the request.

[3] The one strike law provides life sentences and mandatory minimums for individuals convicted of certain sex offenses "in particularly blameworthy circumstances." (*People v. Cervantes* (2017) 9 Cal.App.5th 569, 583, review granted May 17, 2017, S241323; accord, § 667.61.) Specifically, it "mandates indeterminate sentences of 15 or 25 years to life for specified sex offenses that are committed under one or more 'aggravating circumstances,' such as when the perpetrator kidnaps the victim, commits the sex offense during a burglary, inflicts great bodily injury, uses a deadly weapon, sexually victimizes more than one person, ties or binds the victim, or administers a controlled substance to the victim. [Citations.] The purpose of the One Strike law is 'to ensure serious and dangerous sex offenders would receive lengthy prison sentences upon their first conviction,' 'where the nature or method of the sex offense

Prosecution Case

2006 Digital Penetration and Rape of Crystal

Crystal met Lewis in 2005 or 2006. As of October 2006, she was 16 years old and he was 15 years old. Crystal was a virgin. Crystal testified that she received a call from Lewis in the afternoon of October 2, 2006. When Lewis asked Crystal to go to his house, Crystal declined but agreed to meet him at a church.

Crystal met Lewis at the front steps of the closed church. When Crystal saw her brother drive by, Crystal and Lewis moved to the side steps of the church at Crystal's suggestion, because she thought she would be in trouble if her parents learned that she was with a boy. After Lewis and Crystal talked for a while at the side of the church, Lewis put his hand on Crystal's lower back. Crystal told him to stop; Lewis stopped "for a minute" but then resumed. Although Crystal attempted to push Lewis's hand away, Lewis tried to put his hand farther down her back, into her pants. Crystal told him, "no." Feeling unsafe, Crystal stood up and tried to pull a box cutter out of her back pocket, intending to cut Lewis, but the box cutter slipped from her hand. While Lewis and Crystal were on their feet, Lewis held Crystal's pants by the belt loop with one hand, forced his other hand inside her pants, and inserted one or more of his fingers into her vagina. Crystal felt pain and told him "no" and "stop." She tried to pull Lewis's hand out of her pants, but he just dug deeper. She kept telling him to stop, but he persisted.

Lewis kept his finger or fingers inside Crystal's vagina as he pushed or pulled her, against her will, approximately 33 feet through a gate, down a walkway, and behind the church. He then pushed her against the wall of the church, held her by her pants, and tried to bend her over as she faced the wall. By this time, Crystal's pants and underwear had come down part way. Lewis announced that he was going to "stick it in from the back," and Crystal replied, "no." Lewis tried to insert his penis into her vagina from behind and said: " '[Y]ou know you want it. Just let me put it in.' " Crystal said "no"

"place[d] the victim in a position of elevated vulnerability." ' " (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 186, italics omitted.)

and told him to stop; refusing to spread her legs, she was able to prevent him from forcing his penis into her vagina. Crystal continued to struggle with Lewis, ending up on her back on the ground. Ignoring Crystal's continued pleas to stop, Lewis pinned her down, lowered her pants and underwear, and inserted his penis into her vagina. After Lewis stopped his assault, he walked away laughing and called her "bootsy," which is slang for "lame."

At home, Crystal went to the bathroom and felt a burning sensation when she urinated. She also saw blood on her underwear. Crystal burst into tears and told her mother that Lewis had raped her. Crystal's mother called police. Crystal was transported to Highland Hospital, where a "SART" (sexual assault response team) examiner found genital injuries consistent with sexual assault. Crystal's pants and underwear were collected as evidence. The SART examiner testified that Crystal suffered "horrific" injuries to her genitalia that were "some of the most significant injuries [he had] seen in a sexual assault case."

The police investigation proceeded over the next two years. In June 2007, the SART kit was submitted for analysis. That same month, Lewis told police he did not have sex with Crystal or anyone behind a church, and he provided a DNA sample. In August 2008, Lewis's DNA was matched to DNA collected from Crystal's underwear. Crystal subsequently identified Lewis at a photographic lineup, the preliminary examination, and at trial.

2007 Rape of Sabrina

Sabrina testified that after midnight on August 26, 2007, she was waiting for friends outside their Oakland apartment building, when she was grabbed from behind. She tried to hit her assailant with her purse and told the attacker to let her go. A male voice replied, "We could do it the easy way or the hard way." Sabrina was frightened.

The man dragged Sabrina by her hair about four blocks to a dark isolated area in a park, as she struggled and continued to ask him to let her go. He pushed her onto a picnic table, so that her head was on the table and her knees were on the bench. He unbuttoned her pants and pulled down her pants and underwear. She kept saying "no" and was afraid

she was going to die. He inserted his penis into her vagina, rubbed her breast, and tore her shirt. After moving his penis back and forth inside her vagina, he released his grip on her and she ran away. The attacker warned Sabrina that if she told anybody, he would hurt her friends, whom he named.

Sabrina nonetheless reported the rape and underwent a sexual assault examination. An examiner found bruises to her arm and thigh and blunt trauma to her vaginal opening—injuries that would not normally be caused by consensual intercourse. Ultimately, the 2008 DNA analysis matching Lewis's DNA sample to Crystal's SART kit sample provided a "cold hit" in Sabrina's case: Lewis was the major sperm donor in two samples from Sabrina's underwear.

2008 Murder of Tibbs

Tibbs, a Navy veteran and substance abuse counselor at a church, lived in a ground-floor apartment in East Oakland with his fiancée, Pamela Davis, along with their daughter and Davis's other two children. According to Davis and Davis's sister, Tibbs was "laid back" and neither threatening nor aggressive.

Davis had a dog, which Lewis claimed he wanted to see on the night of Tibbs's murder. She explained that, in 2007, a man named Carl Williams had kept a pit bull in the backyard of a nearby abandoned house. In early December 2007, Davis asked to have the dog after it was nearly hit by a car, and Williams agreed. The next day, Williams was killed. Davis and Tibbs kept the dog in their apartment and named it "Cinnamon." In the ensuing six months before May 2008, Lewis never asked to see the dog or went to her apartment to visit it. Nor did Lewis ever claim that it was his dog.

On the night of May 21, 2008, Tibbs was in the apartment studying for his college final exams, while Davis was out of state. Sometime after 11:00 p.m., Tibbs declined to turn Cinnamon over to Lewis, and Lewis ended Tibbs's life. Charles Berry, Tibbs's next-door neighbor, awoke to the sound of gunfire around 11:10 p.m. Berry then heard "some glass being broken." About two minutes after hearing the first gunshots, he heard two or three more. Berry called 911 after hearing the first shots and later spoke to 911 a

second time. Looking out his window, he saw a Black male walking towards the street on Tibbs's side of the fence that divided their properties.[4]

LaTonya Lee, Tibbs's upstairs neighbor, testified that she was in her bedroom and also heard gunshots shortly after 11:00 p.m. She called 911 (recorded at 11:10 p.m.). While she was on the 911 call, she heard glass breaking; she also heard a loud male voice that she did not recognize. When she heard another gunshot, she called the police again. Lee peeked out her window and saw someone with "long dreads" standing on the curb and walking between her apartment building and Berry's fence. She heard a woman near the street say " 'come on' " more than once.

Around this time, Davis and her sister received a call from Tibbs, saying Lewis was outside, " 'shooting up the house to get the dog.' " Multiple gunshots, sounding like they were coming from outside the apartment, could be heard in the background. Davis' sister told Tibbs to call 911. At 11:16 p.m. and 11:20 p.m., Tibbs connected with 911 and reported that Lewis had shot him in the chest.

Tibbs died, at Highland Hospital at 11:55 p.m., from a gunshot wound to the right side of his chest. At 11:56 p.m., Lewis and his girlfriend, Dominique Pierson, also arrived at Highland Hospital. Lewis claimed he had been shot in the right hand, but his only wounds were two very "superficial" lacerations, consistent with cuts from a sharp object such as glass; the treating physician testified it was unlikely that the wounds were from a gunshot or a machete blade. The emergency room physician who examined Lewis saw no evidence he was under the influence of drugs or alcohol.

In a statement given to the police the day after the shooting, Pierson told officers that Lewis had been arguing with a man (Tibbs) about a dog. Lewis said, " 'I want my fucking dog' " and " 'Give me my fucking dog.' " Tibbs said, " 'Get the fuck out of

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[4] At trial, Berry clarified that he heard "at least two" gunshots. Berry also provided police with a written statement, which asserted he awoke to the sound of a gunshot around 11:15 p.m.; about 10 seconds after the first gunshot, he heard glass break; about five seconds later he heard a second gunshot; about a minute after that, he looked out the window and saw a Black male and female.

here' "; " 'Get the fuck from in front [of] my door' "; " 'This ain't your dog' "; and " 'Ain't no dog here.' " When Pierson tried to persuade Lewis to leave, he told her to " '[s]hut the fuck up, bitch.' " Near the apartment door, Lewis said, " 'You gonna play with me[?]' 'I want my fucking dog.' " " 'You, ain't gonna bring my dog outside?' " By this point, Lewis had pulled out a gun. As Pierson walked away, she heard two gunshots. Lewis later ran up to her, saying, " 'He shot me. He shot me in my arm,' " but Lewis's hand, not his arm, was bleeding, and his hand did not look like it had been shot.[5]

Officers' inspections of Tibbs's apartment building showed glass from the broken kitchen window, near where Tibbs would customarily study, was both inside and outside the apartment. One bullet casing was found on Berry's driveway (on the other side of the fence from Tibbs's residence), in the general vicinity of the broken window. A second casing was found in the inside track of the broken kitchen window, consistent with a gun being fired from within the window frame.

A rusted machete that Davis kept in the kitchen was found on the ground by a walkway outside, near the broken window; small pieces of shattered glass were around the machete, but the machete had no blood on it. Strike marks consistent with the machete blade were inside the apartment above the broken window and on top of a nearby fish tank, which did have blood on it. Police did not find a gun inside the apartment, and Tibbs did not own one.

Outside the apartment, a trail of blood led to a bus stop. Forensic analysis determined that it was Lewis's blood on the glass from the broken window and on the ground outside the apartment. According to an investigator, Tibbs was inside the apartment, close to the window, when he was shot. Tibbs left strike marks on the inside of the window (with the machete) while Lewis was at the window.

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[5] At trial, Pierson was less forthcoming. She testified that she and Lewis had consumed alcohol and Ecstasy on the day of the shooting. She heard Lewis and the other man arguing about a dog, and Lewis sounded a little upset. Lewis had a gun. At some point she said, " 'let's go' " and heard gunshots. She then saw that Lewis's hand was bleeding, and they went to the hospital.

October 2008 Police Interview with Lewis

On October 15, 2008, Lewis was in custody in juvenile hall for the Tibbs murder. After waiving his rights, he spoke to detectives investigating the rapes of Crystal and Sabrina. Shown a photograph of Crystal, Lewis said he had not had sex with her, or that he did not remember for sure because "[he] done has [*sic*] sex with a whole lot of girls." Shown Sabrina's photograph, Lewis denied dating her, talking to her, or knowing her.

Defense Case

Lewis's mother, Alicia Grayson, testified that Williams had been like an older brother to Lewis and was important because Lewis's father had died before Lewis was born. Lewis helped feed and walk the dog Williams kept at a vacant house. When Williams was shot to death (attempting an armed robbery) in December 2007, Lewis "cried like a baby" and became depressed. She later suspected Lewis started taking Ecstasy, noting his behavior had changed in that he "moved fast" and "talked fast."

In the afternoon of May 21, 2008, Grayson saw Lewis and Pierson on the street where Tibbs lived. Lewis was "moving fast," "speeding," and not staying still. He saw a newspaper article listing the people killed in Oakland during 2007, including Williams. Grayson left the area around dusk.

Jury Verdict and Original Sentence

The jury acquitted Lewis of first degree murder, but found him guilty of second degree murder. The jury also found Lewis guilty of the sexual penetration and forcible rape of Crystal and the forcible rape of Sabrina. In addition, the jury found true the enhancement for personal use of a gun with respect to the murder charge (§ 12022.53, subd. (d)), as well as the one strike law allegations that Lewis's sex offenses involved multiple victims and kidnapping (former § 667.61, subds. (d)(2), (e)(5).)

Lewis was sentenced to a term of 115 years to life in state prison, comprised of 15 years to life for the murder of Tibbs; a consecutive 25 years to life for the firearm enhancement; and, pursuant to the one strike law, a consecutive 25-years-to-life term for each of the three sex crimes.

2016 Resentencing

After the remittitur in *Lewis I* was filed, the prosecutor filed a sentencing memorandum arguing Lewis's offenses reflect his irreparable corruption within the meaning of *Miller*. The People emphasized that Lewis was 17 years old when he murdered Tibbs, had committed four violent felonies—all of which were predatory, sadistic, and callous—and acted alone and over pleas to stop in each case. The People acknowledged Lewis's exposure to violence but pointed out that Lewis could not blame his crimes on despondence over Williams's death, as the three sex offenses occurred before Williams was killed.

At a three-day resentencing hearing before the same judge who presided over his trial and original sentencing, Lewis presented extensive expert testimony. First, Elizabeth Cauffman, Ph.D., a research psychologist, testified as an expert in adolescent brain development. Cauffman discussed research suggesting violent criminal behavior peaks between ages 18 and 20 then tends to decline. Although the average adolescent's intellectual or cognitive ability may reach adult levels around age 16, emotional or psychological development, including impulse control and long term thinking, continues into early adulthood.[6] She described a maturity "gap"; teens may know the difference between right and wrong but emotionally be unable to control themselves. Because the prefrontal cortex is not fully developed until around 25, adolescents tend to engage in riskier behavior than adults, focus more on rewards and less on punishment than adults, and have a harder time not doing things they know not to do than adults.

Gretchen White, Ph.D., also testified as an expert in forensic psychology. In order to create a psychosocial history, White had reviewed Lewis's prison and school records, the probation report, portions of the trial transcript, and the *Lewis I* opinion. She also spoke with Lewis for four to five hours, as well as, among others, Lewis's mother, ex-

[6] On cross-examination, Cauffman acknowledged maturity rates vary, and some teens attain emotional maturity before age 18.

girlfriend, and cousin.[7] White opined that Lewis grew up in a community that "in some ways was very close and loving" but was also "a very risky environment." Lewis had strong attachments to his family members and friends. Lewis's mother and grandmother, with whom he lived, were loving, supportive, and provided for his basic needs. There was no evidence of abuse. Lewis said his mother sold drugs, which distressed him. Lewis's grandmother was described as the backbone of the family, who "picked up the pieces" for Lewis's mother. Lewis's school records showed that he engaged in fights, was defiant of school authority, and had extensive unexcused absences.

Lewis had experienced significant violence and loss. His father was killed before he was born. In 2005, Lewis witnessed the murder of a friend. The same year, Lewis was shot in the shoulder. Thereafter, Lewis began carrying a gun. The next year another of Lewis's friends was killed, and the year after that Williams was shot and killed while committing a robbery. Williams's death greatly impacted Lewis, as he considered Williams his best friend. White opined, "It was for [Lewis] like losing both his best friend and . . . his big brother, . . . pretty much his everything." At this point, Lewis became depressed, withdrawn, angrier, and began to drink and use drugs heavily. Lewis said he used ecstasy, among other drugs, which White believed can "increase[] the likelihood of acting out [and] bad behavior." Lewis also admitted smoking marijuana. He told White that, when placed on probation after his juvenile adjudication, he did not quit smoking marijuana altogether, but was able to time his use to avoid positive drug test results.

Lewis admitted his involvement in a fight in jail. He had suffered a prison disciplinary violation, for possession of dangerous contraband, after he was found to have dismantled a hot plate and kept the metal, which could be used as a weapon, in his cell. Once in prison, Lewis began therapy and psychotropic medication to address impulsive

[7] In her testimony, White relayed hearsay from the interviews she conducted and the school and prison records she reviewed. Although the underlying records themselves were admitted into evidence, the out of court statements made to White were not admitted for their truth.

and angry behavior. His 2014 prison medical records showed Lewis had been diagnosed with a mood disorder, posttraumatic stress disorder, antisocial personality disorder, and intermittent explosive disorder. White opined that Lewis was maturing "quite normally, as one would expect." Looking solely at his psychosocial history, rather than the crimes he committed, White did not see any impediment to the possibility of rehabilitation.

Daniel Vasquez, who had worked for the California Department of Corrections and Rehabilitation (CDCR) for 30 years, including as a warden, testified as an expert on prison adjustment and future dangerousness. Vasquez interviewed Lewis and reviewed his central prison file, which included criminal and prison history, arrest reports, probation reports, prison disciplinary reports, and medical/mental health history. Lewis did not "have any reports of assaulting other inmates or assaulting staff, or threatening staff, or threatening inmates," which Vasquez opined was somewhat unusual for an inmate designated "level four" or "maximum custody." Lewis had sustained only the one disciplinary violation, for possession of dangerous contraband, described above. Lewis was participating in anger management classes and counseling. Based on Lewis's past behavior in prison, Vasquez believed Lewis would not pose a future danger to society.[8]

L.C. testified that she dated Lewis for approximately a year, 10 years earlier, when she was 14. She had an eight-year-old child with Lewis, to whom Lewis was a "good father." In her experience, Lewis was respectful, understood that "no means no," and knew how to follow rules. Lewis's family was close and supportive. After Williams was murdered, Lewis changed dramatically; he began to act sad and distant. L.C. had seen Lewis with Williams's dog when he and Williams were together, but Lewis never professed any special attachment to the dog.

Lewis's cousin, Derrick Monroe, testified he had been involved with Lewis in rap music and the Goonz. Monroe, who had never been arrested, described Lewis as a

[8] Although Vasquez initially testified Lewis had no gang affiliation, CDCR records showed Lewis has admitted active affiliation with the "Bloods" and "STI Goonz."

leader, not a bully. Monroe knew Lewis carried a gun, but never saw him brandish it. After Williams was killed, Lewis became depressed, stressed, and sad.

Lewis himself made a brief statement of apology to his victims. The trial court also took judicial notice of the evidence at trial, the original presentencing probation report, and admitted Lewis's CDCR and school records. The probation report described Lewis's juvenile criminal history, which began in 2007, when at the age of 16 he was placed on nonwardship probation for possessing marijuana for sale (Health & Saf. Code, former § 11360, subd. (a).). In fact, Lewis was on probation at the time he committed the Tibbs murder. The probation officer also observed that Lewis had scored in "the Moderate-High Risk Category" on the Static-99R, "which is an actuarial measure of risk for sexual offense recidivism."

At the conclusion of the resentencing hearing, the trial court resentenced Lewis to a total term of 115 years to life. Again the sentence was comprised of 75 years to life for nonhomicide offenses (25 years to life for each of the aggravated sex offenses, to be served consecutively) and 40 years to life with respect to the homicide offense (15 years to life for second degree murder and 25 years to life for the gun use enhancement).

The trial court explained: "Lewis is a smart and cunning young man. He knew how to commit these crimes, and . . . he knows now what it takes to get along in the prison system. Were he to be released, this Court does believe that he would continue to be a danger to our society. [¶] These crimes were not attributable to any youthful folly. [Lewis's] crimes went way beyond that. [Lewis] is that rare juvenile offender whose crimes reflect irreparable corruption. This Court finds that the circumstances of [Lewis's] offenses show such irreparable corruption as to warrant a de facto life without parole sentence without offending the [E]ighth [A]mendment. Therefore, it is this Court's decision after considerable thought and careful consideration of the testimony of the expert witnesses and other Defense witnesses that in light of all the relevant circumstances, including [Lewis's] age, sophistication, the extent of his participation, the lack of peer pressure, the fact that he had a caring family, no evidence of any incompetencies or incapacities, that this case involved a three-year crime spree involving

three separate victims. In light of all relevant circumstances, the sentence that was pronounced on December 14th, 2011, shall stand." Lewis filed a timely notice of appeal.

II. DISCUSSION

We concluded, in *Lewis I*, that Lewis's 115-year-to-life sentence, and even the 75-year-to-life component imposed for nonhomicide offenses, is the functional equivalent of a sentence of life without the possibility of parole (LWOP) (*Lewis I*, *supra*, 222 Cal.App.4th at p. 119; see *People v. Caballero* (2012) 55 Cal.4th 262, 267–268 (*Caballero*).) The parties do not seek to relitigate that issue in this appeal. (See *People v. Whitt* (1990) 51 Cal.3d 620, 638–639 ["where an appellate court states a rule of law necessary to its decision, such rule ' "must be adhered to" ' in any ' "subsequent appeal" ' in the same case, even where the former decision appears to be ' "erroneous" ' "].) Instead, the primary question before us is whether Lewis's sentence exceeds the punishment allowable absent a jury finding of irreparable corruption and thereby violates Lewis's Sixth Amendment rights under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). Lewis also asks us to consider whether, in considering the mitigating circumstances of Lewis's youth as required by *Miller*, the trial court abused its discretion. Lewis's arguments are unpersuasive.

A. *Legal Framework*

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This provision "guarantees individuals the right not to be subjected to excessive sanctions" and "flows from the basic ' "precept of justice that punishment for crime should be graduated and proportioned" ' " to both the offense and the offender. (*Roper v. Simmons* (2005) 543 U.S. 551, 560 (*Roper*).) "The concept of proportionality is central to the Eighth Amendment." (*Graham v. Florida* (2010) 560 U.S. 48, 59 (*Graham*).)

Particularly relevant here, the Eighth Amendment prohibition "encompasses the 'foundational principle' that the 'imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.' (*Miller, supra*, 567 U.S. at [p. 474].) From this principle, the high court has derived a number of limitations on

juvenile sentencing: (1) no individual may be executed for an offense committed when he or she was a juvenile (*Roper*, [*supra*,] 543 U.S. at p. 578); (2) no juvenile who commits a nonhomicide offense may be sentenced to LWOP (*Graham*, *supra*, 560 U.S. at p. 74); and (3) no juvenile who commits a homicide offense may be automatically sentenced to LWOP (*Miller*, at [p. 465]).” (*People v. Franklin* (2016) 63 Cal.4th 261, 273–274 (*Franklin*).)

In *Graham*, *supra*, 560 U.S. 48, our nation’s high court considered a juvenile offender who had been sentenced to an LWOP term for a single count of armed burglary. (*Id.* at p. 57.) The *Graham* court held that the Eighth Amendment prohibits LWOP sentences for juvenile offenders who have committed crimes other than homicides. (*Id.* at p. 74.) “Life without parole is an especially harsh punishment for a juvenile” (*id.* at p. 70), which the court concluded could not be justified by retribution, deterrence, incapacitation, or rehabilitation interests when a juvenile offender commits a nonhomicide offense. (*Id.* at pp. 71–75.) “A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime,” because “[t]hose who commit truly horrifying crimes as juveniles may turn out to be irredeemable . . . .” (*Id.* at p. 75.) However, the court held the Eighth Amendment prohibits states from deciding at the outset that juvenile offenders convicted of nonhomicide crimes “will never be fit to reenter society.” (*Ibid*.) Such defendants must be provided “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” (*Ibid*.)

However, the *Graham* court made clear it was not addressing a case like that before us—in which a juvenile offender has committed both homicide and nonhomicide crimes. *Graham* explained: “Juvenile offenders who committed *both homicide and nonhomicide crimes present a different situation* for a sentencing judge than juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination. The instant case concerns only those juvenile

offenders sentenced to life without parole solely for a nonhomicide offense." (*Graham, supra,* 560 U.S. at p. 63, italics added.)

"As to homicide offenses, the United States Supreme Court has held that a state may not impose a *mandatory* LWOP sentence on a juvenile offender, although the sentencing court might impose such a sentence if it has adequately considered the offender's age and environment and found ' "irreparable corruption." ' (*Miller*[, *supra*, 567 U.S.] at pp. [479–480] [noting LWOP sentence for a juvenile offender would be 'uncommon' and imposed against the ' "rare juvenile offender whose crime reflects irreparable corruption" ']; [citation].)" (*Lewis I, supra,* 222 Cal.App.4th at p. 118.) Building on its categorical precedents in *Roper, supra,* 543 U.S. 551 and *Graham, supra,* 560 U.S. 48, the *Miller* court explained, "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders. [Citation.] By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." (*Miller,* at p. 479.)

The *Miller* court discussed the reasons that juveniles are "constitutionally different" from adults for sentencing purposes, including their lack of maturity and underdeveloped sense of responsibility, their vulnerability to outside pressure and negative influences, their limited control over their own environment and their inability to extricate themselves from crime-producing settings, and their greater ability to change due to their possession of a character not as " 'well formed' " as that of an adult. (*Miller, supra,* 567 U.S. at p. 471.) The court further observed that scientific studies show " ' "[o]nly a relatively small proportion of adolescents" ' who engage in illegal activity ' "develop entrenched patterns of problem behavior." ' " (*Ibid.*) Because the parts of the brain involved in impulse control are not fully developed in juveniles, their culpability is lessened and they have greater prospects for reform. (*Id.* at pp. 471–472, & fn. 5.) These characteristics were deemed "at odds" with the defining features of LWOP, which " 'forswears altogether the rehabilitative ideal' " and "reflects 'an irrevocable judgment about [an offender's] value and place in society.' " (*Id.* at p. 473.) Thus, mandatory

LWOP for a juvenile "disregards the possibility of rehabilitation even when the circumstances most suggest it." (*Id.* at p. 478.)

Although prohibiting mandatory LWOP sentences, *Miller* made clear that it was not establishing a categorical prohibition on LWOP sentences for juvenile offenders convicted of homicide, but requiring individualized sentencing for such offenses. (*Miller, supra,* 567 U.S. at pp. 474, fn. 6, 479–480.) The *Miller* opinion "does not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the high court] did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." (*Miller,* at p. 483.) But *Miller* also cautioned: "[G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty . . . of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' [Citations.] Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Miller*, at pp. 479–480, fn. omitted.)

The United States Supreme Court has since concluded that *Miller*'s prohibition on mandatory LWOP for juvenile offenders announced a substantive rule of constitutional law that must be given retroactive effect. (*Montgomery v. Louisiana* (2016) 577 U.S. ____ [136 S.Ct. 718] (*Montgomery*).) In reaching that conclusion, the *Montgomery* court said, "Because *Miller* determined that sentencing a child to [LWOP] is excessive for all but ' "the rare juvenile offender whose crime reflects irreparable corruption," ' [citation], it rendered [LWOP] an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. [Citation.] . . . [¶] . . . *Miller* is no less substantive than are *Roper* and *Graham*.

Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to [LWOP]. After *Miller*, it will be the rare juvenile offender who can receive that same sentence." (*Montgomery*, at p. ___ [136 S.Ct. at p. 734].)

"*Miller* and *Montgomery* do *not* absolutely prohibit sentences of life without parole for juveniles who commit murder." (*In re Kirchner* (2017) 2 Cal.5th 1040, 1056, fn. 12, italics added.) But *Miller* and *Montgomery* do require a trial court considering the possibility of LWOP for a juvenile offender to consider the offender's chronological age and its hallmark features, any information regarding the juvenile's family and home environment, all information available regarding the circumstances of the homicide offense, including the extent of the juvenile's participation and the existence of any familial or peer pressure, any information as to whether the juvenile might have been charged and convicted of a lesser offense if not for the incompetencies of youth, and any other information bearing on the possibility of rehabilitation. (*Kirchner*, at pp 1048, 1054; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1387–1389 (*Gutierrez*).) Our Supreme Court has reiterated, "the trial court must consider all relevant evidence bearing on the 'distinctive attributes of youth' discussed in *Miller* and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders.' [Citation.] To be sure, not every factor will necessarily be relevant in every case. For example, if there is no indication in the presentence report, in the parties' submissions, or in other court filings that a juvenile offender has had a troubled childhood, then that factor cannot have mitigating relevance. But *Miller* 'require[s] [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.' " (*Gutierrez*, at p. 1390.)

In *Caballero, supra,* 55 Cal.4th at page 268, our Supreme Court extended *Graham* and held "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." In *Caballero*, the juvenile defendant received an aggregate 110-year-to-

life sentence, which obviously exceeded his life expectancy, for three counts of attempted murder, plus firearm, gang, and great bodily injury enhancements. (*Id.* at p. 265.) *Caballero* ruled that a cumulative sentence for distinct crimes, imposing a total term of imprisonment in excess of the offender's life expectancy, is the functional equivalent of an LWOP sentence even if each of the sentences comprising the aggregate, standing alone, included the possibility of parole within his lifetime. (*Id.* at pp. 267–268.) " '[L]ife expectancy' " was defined by the *Caballero* court to mean "the normal life expectancy of a healthy person of defendant's age and gender living in the United States," which suggests consultation of mortality tables is required. (*Id.* at p. 267, fn. 3; accord, *People v. Cervantes, supra,* 9 Cal.App.5th at pp. 616, 618, rev. granted.)

In *Lewis I*, we recognized that "Lewis was convicted not just of nonhomicide offenses, but of a homicide offense as well" (*Lewis I, supra*, 222 Cal.App.4th at p. 122), and that our Supreme Court, in *Caballero, supra*, 55 Cal.4th at page 268, footnote 4, was careful to point out that it did not address a situation where the juvenile offender, like Lewis, had committed a homicide. (*Lewis I*, at p. 122.) We concluded that when a juvenile offender is subject to a mixed sentence—having been convicted not just of nonhomicide offenses, but also of a homicide offense—we judge the constitutionality of his or her parole eligibility date "by looking at the sentence as a whole," rather than its individual parts. (*Id.* at p. 122.) We explained: "Since the United States Supreme Court recognizes there are circumstances in which a juvenile who commits a single homicide as his only offense might be found to be of such irreparable corruption as to warrant an actual LWOP without offending the Eighth Amendment, certainly there could be circumstances in which a juvenile who commits a homicide and three separate one strike sexual offenses could be of such irreparable corruption as to warrant a de facto LWOP without offending the Eighth Amendment." (*Ibid.*) We remanded for a new sentencing hearing because the trial court did not have the opportunity to determine the appropriate sentence under *Miller*. (*Id.* at pp. 122–123.) We instructed the trial court to set a parole eligibility date within Lewis's expected lifetime, "unless it finds that Lewis's offenses reflect his irreparable corruption within the meaning of [*Miller*]." (*Id.* at p. 123.) Thus,

Miller applies to Lewis's mixed sentence—composed of multiple terms for both nonhomicide and homicide offenses. (*Lewis I, supra*, 222 Cal.App.4th at p. 122.)

After Lewis's resentencing hearing was completed, our Supreme Court decided *Franklin, supra*, 63 Cal.4th 261. In that case, the juvenile offender was sentenced to a mandatory term of 50 years to life—made up of two consecutive terms of 25 years to life (one for first degree murder and one for personal and intentional discharge of a firearm). (*Id.* at pp. 272–273.) Our Supreme Court observed that because *Miller* was decided after Franklin's sentencing and because the trial court was required to impose this sentence, pursuant to sections 190, subdivision (a) and 12022.53, subdivisions (d) and (h), "the trial court had no discretion to consider [the defendant's] youth as a mitigating factor." (*Franklin*, at p. 276; *id.* at pp. 268–269, 272–273.) The *Franklin* court did not decide the question of whether a mandatory 50-years-to-life term constituted an unconstitutional de facto LWOP sentence because the Legislature's enactment of section 3051 mooted any *Miller* claim. (*Id.* at p. 268.) Section 3051 makes most juvenile offenders who committed their controlling offense under the age of 23 eligible for "youth offender parole hearing[s]" no later than his or her 25th year of incarceration. (§ 3051, subd. (b).) Thus, under section 3051, Franklin was serving a sentence that included a meaningful opportunity for release during his 25th year of incarceration and was not serving the "functional equivalent" of LWOP. (*Franklin*, at pp. 278–280.) Our Supreme Court explicitly noted: "We express no view on *Miller* claims by juvenile offenders who are ineligible for such a hearing under section 3051, subdivision (h), or who are serving lengthy sentences imposed under discretionary rather than mandatory sentencing statutes." (*Id.* at p. 280.)

Unlike the defendant in *Franklin*, Lewis is ineligible for a youth offender parole hearing under section 3051. Section 3051, subdivision (h), provides: "This section shall not apply to cases in which sentencing occurs pursuant to Section 1170.12, subdivisions (b) to (i), inclusive, of Section 667, or Section 667.61, or in which an individual was sentenced to life in prison without the possibility of parole." This exception applies to Lewis because he was sentenced pursuant to section 667.61. His aggravated sex offense

convictions render him ineligible for a youth offender parole hearing under section 3051. (*People v. Cervantes, supra,* 9 Cal.App.5th at p. 617, rev. granted.)

Given our previous determination in *Lewis I*, the questions before us are quite limited. Both parties agree that the trial court could impose LWOP on Lewis, but only if, after considering the *Miller* factors, Lewis is determined to be irreparably corrupt. The parties only disagree on whether the trial court or a jury was entitled to make that determination and, if the former, whether the trial court abused its discretion. According to Lewis, "Post-*Miller*, it is beyond question that the court could *not* impose LWOP on Lewis based only on the jury's finding of guilt for the crimes. [M]ore was required. . . . [T]he sentencing court was required to set a parole date and could only impose LWOP upon a [jury's] finding of irreparable corruption after considering the *Miller* factors."

B. *Is a jury finding of irreparable corruption required under* Apprendi?

Lewis maintains the trial court's imposition of a de facto LWOP term violated the Sixth Amendment because he was deprived of his right to have a jury, rather than a judge, make the finding allowing for an increase in his sentence beyond the statutory maximum. He acknowledges that irreparable corruption is a constitutionally required finding, rather than an element of any crime required by the legislature. But he contends irreparable corruption should be treated as a "necessary finding" that is functionally the equivalent of an element of a greater offense. We address the argument despite his failure to assert the issue below. (See *People v. French* (2008) 43 Cal.4th 36, 46–48 [defendant did not forfeit Sixth Amendment rights by failing to request jury trial on aggravating circumstances].)

In *Apprendi*, the United States Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi, supra,* 530 U.S. at p. 490, italics added.) In *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), the high court further defined " 'statutory maximum' " as the "maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Id.* at p. 303, italics omitted.)

The United States Supreme Court has since applied "*Apprendi*'s rule to facts subjecting a defendant to the death penalty [(*Ring v. Arizona* (2002) 536 U.S. 584, 602, 609)], facts allowing a sentence exceeding the 'standard' range in Washington's sentencing system [(*Blakely, supra,* 542 U.S. at pp. 304–305)], and facts prompting an elevated sentence under then-mandatory Federal Sentencing Guidelines [(*United States v. Booker* (2005) 543 U.S. 220, 244)]." (*Oregon v. Ice* (2009) 555 U.S. 160, 167.) And in *Cunningham v. California* (2007) 549 U.S. 270, the high court held California's then operative determinate sentencing law violated the Sixth Amendment by "allow[ing] a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Id.* at p. 275.)

"The high court's decision in [*Oregon v.*] *Ice, supra,* 555 U.S. 160, refined and circumscribed the scope of the rule of *Apprendi* and its progeny in significant ways." (*People v. Mosley* (2015) 60 Cal.4th 1044, 1057.) In concluding that the decision to impose consecutive sentences is not subject to *Apprendi*, the *Ice* court observed: "The [*Apprendi*] rule's animating principle is the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense. [Citation.] Guided by that principle, our opinions make clear that the Sixth Amendment does not countenance legislative encroachment on the jury's traditional domain." (*Ice*, at p. 168.) But the Supreme Court also emphasized that *Apprendi* does not extend "beyond the offense-specific context that supplied the historic grounding for the decisions." (*Ice*, at p. 163.)

In *People v. Blackwell* (2016) 3 Cal.App.5th 166 (*Blackwell*),[9] we considered a juvenile offender who was convicted of first degree murder with a robbery-murder special circumstance. We held a juvenile homicide offender sentenced to LWOP has no Sixth Amendment right to a jury finding on irreparable corruption. (*Id.* at pp. 183, 188.) After tracing the origins of the *Apprendi* doctrine, we observed that *Miller* was silent on the question of who determines irreparable corruption—the judge or the jury? We also

[9] A petition for certiorari is pending before the United States Supreme Court.

looked to the statute governing the penalty for special circumstance murder (§ 190.5, subd. (b)) and recognized it differed from the statutory schemes mandating LWOP that had been at issue in *Miller*. (*Id.* at p. 186.) Because section 190.5, subdivision (b), as interpreted by our Supreme Court in *Gutierrez*, *supra*, 58 Cal.4th at pages 1361, 1387 to 1389, provides a sentencing court with discretion to select LWOP or a term of 25 years to life and " 'authorizes and indeed requires consideration of the distinctive attributes of youth,' " we determined the statute does not violate *Miller*. (*Blackwell*, at pp. 187–188.) Under section 190.5, subdivision (b), "after the jury convicted Blackwell of first degree murder with special circumstances, LWOP *was* the maximum statutory sentence the court could impose. The trial court's consideration of the *Miller/Gutierrez* factors relating to the offense and offender in exercising its discretion to impose sentence within a prescribed range did not violate *Apprendi*." (*Blackwell*, at p. 188, italics added.)

We also rejected Blackwell's position that the *Apprendi* principle should apply to not only statutorily prescribed facts, but also to "constitutionally prescribed facts." (*Blackwell, supra,* 3 Cal.App.5th at p. 193.) In other words, Blackwell had argued, as Lewis does here, that, "notwithstanding section [190.5, subdivision (b)] and *Gutierrez*, *Miller* alone imposes a categorical Eighth Amendment limit that acts as a ceiling beyond which a juvenile offender convicted of homicide cannot be sentenced, unless a jury finds beyond a reasonable doubt that he is irreparably corrupt." (*Blackwell*, at p. 191.) We observed that *Montgomery* confirmed *Miller* does *not* require a finding of fact regarding a juvenile offender's incorrigibility or irrevocable corruption. (*Blackwell*, at p. 192, citing *Montgomery, supra*, 577 U.S. at p. ___ [136 S.Ct. at p. 734]; *id.*, at p. ___ [136 S.Ct. at p. 735] ["*Miller* did not impose a formal factfinding requirement"].) We then analogized *Miller* to *Enmund v. Florida* (1982) 458 U.S. 782 and *Tison v. Arizona* (1987) 481 U.S. 137, in which the United States Supreme Court promulgated certain culpability requirements for imposition of the death penalty under the Eighth Amendment. Because the Sixth Amendment does not require *Enmund/Tison* findings to be made by a jury, we reached a similar result with respect to *Miller*'s irreparable corruption determination. (*Blackwell*, at p. 193, citing *Cabana v. Bullock* (1986) 474 U.S. 376, 386.) We

explained: "Because the *Enmund/Tison* findings serve to disqualify otherwise death-eligible defendants, and thus *mitigate* punishment, we view *Cabana*'s holding as not inconsistent with *Apprendi.* [Citations.] [¶] Similarly, *Miller* does not require irreparable corruption be proved to a jury beyond a reasonable doubt in order to aggravate or enhance the sentence for juvenile offender convicted of homicide. *Miller*, like *Enmund/Tison*, avoids disproportionate punishment by mandating consideration of *mitigating circumstances* specific to youth. This is not the same as increasing the punishment authorized by a jury's verdict based on a fact not found by the jury." (*Blackwell*, at p. 194, italics added.)

Here, unlike in *Blackwell*, Lewis was not convicted of special circumstance murder and thus section 190.5, subdivision (b), has no application. Yet Lewis is off base in attempting to distinguish *Blackwell* on this basis. He argues: "Here, the 115-year sentence is a *de facto* LWOP sentence. Unlike a sentence imposed pursuant to section 190.5(b), a de facto LWOP sentence lacks an explicit statutory basis . . . . The statutory scheme recognizes imposition of a term of years only and only when a court finds irreparable corruption can the cumulative sentence stand . . . ." We are unpersuaded.

As the People correctly point out, Lewis, like Blackwell, was *not* sentenced beyond the statutory maximum term for any of his offenses. (§§ 190, subd. (a) ["every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 15 years to life"], 667.61, subd. (a) ["any person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 25 years to life], 12022.53, subd. (d) ["any person who, in the commission of [murder], personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life"].) In fact, once the jury found Lewis guilty of all four substantive offenses and found the firearm enhancement allegation and section 667.61 allegations true, the length of each of

Lewis's individual terms became mandatory. The trial court had no discretion but to impose a term of 15 years to life for the murder and a consecutive term of 25 years to life for the firearm enhancement. (See §§ 190, subd. (a), 12022.53, subds. (d), (h) ["[n]otwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section"]; *Franklin, supra*, 63 Cal.4th at p. 273 [firearm enhancements are mandatory; they cannot be stricken or stayed by trial court].) Imposition of the three 25-year-to-life sentences for the aggravated sex offenses was also required once the jury found the kidnapping allegation true. (§ 667.61, subds. (a), (d)(2), (g) ["the court shall not strike any allegation, admission, or finding of any of the circumstances specified in subdivision (d) or (e) for any person who is subject to punishment under this section"].)

Lewis's aggregate sentence is a de facto LWOP because the trial court determined the terms for his multiple offenses would run consecutively. In the unpublished portion of our *Lewis I* opinion, we upheld the trial court's finding Lewis had reasonable opportunities to reflect between counts two and three and concluded the court, pursuant to section 667.61, subdivision (i), properly imposed consecutive sentences on those counts. At his resentencing, the trial court made a similar finding that Lewis had a reasonable opportunity for reflection between the digital penetration and rape of Crystal. Once the trial court found the two offenses against Crystal to be separated by an opportunity to reflect, the trial court had no discretion but to impose consecutive terms for the three one strike offenses.[10] (§ 667.61, subd. (i) ["the court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6"].)

As in *Blackwell*, the jury found all facts required to make Lewis eligible for the statutory maximum aggregate sentence. (§§ 190, subd. (a), 667.61, subds. (a), (d)(2),

[10] Lewis does not argue that the mandatory consecutive sentencing scheme is unconstitutional under *Miller* or *Graham*.

(e)(4), 12022.53, subd. (d).) The trial court considered the *Miller* factors in exercising its discretion to impose punishment *less than* the statutory maximum. In deciding whether to impose terms consecutively and determining Lewis's aggregate sentence, the trial court's consideration of *mitigating* circumstances under *Miller* did not violate *Apprendi*.[11] (See *Blackwell, supra*, 3 Cal.App.5th at pp. 194–195; *People v. Black* (2007) 41 Cal.4th 799, 821–825 [*Apprendi* does not apply to decision to impose consecutive sentences]; *Oregon v. Ice*, *supra*, 555 U.S. at pp. 167–168 [same].)

C. *Abuse of Discretion*

In the alternative, Lewis argues the trial court abused its discretion when, at resentencing, it again selected an aggregate sentence of 115 years to life. A court's exercise of discretion will not be disturbed on appeal absent a showing that the court acted in an arbitrary, capricious, or patently absurd way, resulting in a manifest miscarriage of justice. (*People v. Jordan* (1986) 42 Cal.3d 308, 316.) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citation.] Second, a ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' " (*People v. Carmony* (2004) 33 Cal.4th 367, 376–377.)

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[11] Because Lewis's *Apprendi* challenge fails on the merits, we need not consider the People's further argument that the trial court lacked jurisdiction to convene a jury for a sentencing trial. However, we observe the law of the case doctrine has no application to an issue, like the *Apprendi* issue before us, not raised or decided in a prior appeal. (See *People v. Boyer* (2006) 38 Cal.4th 412, 442 [doctrine applies to legal issue presented and decided in prior appeal]; *Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 62 [same].)

Lewis urges us to conclude *Miller* established a presumption of immaturity and a presumption against the imposition of a LWOP sentence.[12] We rejected similar arguments in *Blackwell*, *supra*, 3 Cal.App.5th at pages 190, footnote 10, 200 to 201. " 'No particular factor, relevant to the decision whether to impose LWOP on a juvenile who has committed murder, predominates under the law. Hence, as long as a trial court gives due consideration to an offender's youth and attendant characteristics, as required by *Miller*[, *supra*, 567 U.S. 460], it may, in exercising its discretion . . . give such weight to the relevant factors as it reasonably determines is appropriate under all the circumstances of the case.' " (*Blackwell*, at p. 200, quoting *People v. Palafox* (2014) 231 Cal.App.4th 68, 73.) Lewis has presented no compelling reason to reconsider the conclusion we reached in *Blackwell*.

Lewis also insists the trial court "failed to properly consider all the *Miller* factors" and abused its discretion by assigning insufficient weight to the trauma Lewis suffered as a result of violence in the community and his prospects for rehabilitation. In resentencing Lewis to an aggregate sentence of 115 years to life, the trial court explained: "Children are different from adults at various ages and in varying degrees. At ages 15, 16, and 17, [Lewis] was emotionally and cognitively able to regulate and control himself in order to get what he wanted when he wanted it. He showed much impulse control, taking advantage of situations. For example, by taking advantage of his friendship with the naïve young lady who was then the victim of the 2006 sexual assault and then taking advantage of an unsuspecting woman alone in the 2007 rape, and also by using that force

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[12] These questions are pending review before our Supreme Court in *People v. Padilla* (2016) 4 Cal.App.5th 656, review granted January 25, 2017, S239454 (*Padilla*) and *People v. Arzate*, review granted January 25, 2017, S238032.

We do not address Lewis's argument, made without adequate explanation or citation to supporting authority, that the holding of *Godfrey v. Georgia* (1980) 446 U.S. 420 "must apply" in juvenile LWOP cases. Lewis has forfeited the argument by failing to include reasoned analysis of the point in his opening brief. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793 [if no legal argument with citation to authority " 'is furnished on a particular point, the court may treat it as waived, and pass it without consideration' "].)

to move these female victims to places where they could not easily be detected. [¶] Around this same time, however, [L.C.] . . . and [Lewis] were dating, and she became pregnant with their daughter who was born in 2007. [L.C.] also testified that while [they were] dating, [Lewis] was playing basketball and playing by the rules . . . . [¶] When analyzing [Lewis's] criminal behavior, it is apparent that his crimes became increasingly more vicious and violent. In 2006, when his friend refused to have sex with him, he turned into a violent, selfish predator who deliberately dug his fingers into her vagina, dragged her to a secluded area and forcibly raped her as she repeatedly begged him not to do so. According to the medical examiner, this young lady suffered horrific injuries to her vagina. This conduct on the part of [Lewis] was cold and calculated and mean and violent. This was not just haphazard, immature conduct. He acted alone. There was no evidence that he was suffering from any mental impairment or any impairment due to drugs or alcohol. This was reprehensible conduct. All the while, he was being nice to [L.C.] and enjoying school and time with his family and friends. And he was described as having a close-knit family and neighborhood.

"In 2007, when he was 16 years old, he preyed upon an unsuspecting stranger, a woman alone in the early morning hours. [Lewis] grabbed her from behind by the hair and dragged her some distance to a secluded area of a park. He then forcibly raped her while she continuously tried to get away from him. . . . This was not just haphazard, immature conduct. This was not youthful conduct. He was not pushed into this conduct because of peer pressure. He acted alone. There was no evidence of mental impairment or impairment due to drugs or alcohol. This was reprehensible conduct. It was also during this time period that he became a father and showed much love and care to his baby girl. It was also at this time that he was enjoying his tight-knit family and friends and neighborhood. In these two offenses, [Lewis] showed a pattern of greater violence from attacking a friend to attacking a stranger.

"Then, in 2008, when he was 17 years old and his baby daughter was a year old, his life of crime escalated to the point where, on May 21st, 2008, around 11:00 p.m., and carrying a loaded .25-caliber gun, [Lewis] went to the home of a family friend demanding

that the occupant of the home turn a dog over to him. The dog had been with this family for a year or so. This dog did not belong to [Lewis]. And in fact, his mother had told him quite a while before that he could not have the dog at her home. When the request for the dog was denied, [Lewis] with willful and wanton disregard for the safety of anyone shot through the window of the victim's home. [Lewis] then reached through the shattered window and shot the victim directly in his chest. . . . The victim died from that point-blank gunshot wound to his chest . . . . This victim was the fiancé of [Lewis's] mother's friend, a neighbor who had previously welcomed them both, [Lewis] and his mother, into their home on many occasions. [¶] Again, as in 2006 and 2007, this was not a random act of recklessness, impulsivity or needless risk-taking. All of these were goal-directed acts of violence and cruelty. Again, [Lewis] acted alone. There was no evidence of mental impairment or impairment due to drugs or alcohol. This murder continued [Lewis's] pattern of the horrific conduct of a predator looking to satisfy his selfish wants and needs by any means necessary. So the fact that he was able to have proper, normal relationships and then go into these acts showed irreparable corruption.

"[Lewis] committed not one, not two, not three, but four increasingly more violent crimes. Three of these crimes were committed against a friend or a family friend. They were committed despite [Lewis] having a grandmother who cared for him dearly, a mother who loved him and worked to give him a decent home, a girlfriend, a little baby, numerous family members and friends. [¶] This Court has considered the testimony of the expert witnesses who testified in this case, the age of [Lewis] at the time of these offenses, and the possibility of rehabilitation. And while this Court certainly appreciates and understands that a juvenile offender may show signs of immaturity and a failure to appreciate risk and consequences, this case involved three separate incidents in three different years with three separate victims, increasing in violence. Certainly [Lewis] as he aged understood that it was wrong to rape a woman, particularly since he was having a nonviolent relationship with [L.C.] with whom he had a child. He acted alone. There was no peer pressure to commit these offenses. [¶] . . . Lewis is a smart and cunning young man. He knew how to commit these crimes, and . . . he knows now what it takes

to get along in the prison system. Were he to be released, this Court does believe that he would continue to be a danger to our society."

Here, as in *Blackwell*, the trial court explicitly considered the relevant *Miller* factors and was aware it should set a parole eligibility date within Lewis's lifetime if his offenses did not reflect irreparable corruption. The trial court did not abuse its discretion by "fail[ing] to consider Lewis' lack of prior experience with law enforcement," as Lewis suggests. The factor is not mitigating in this case because, at the time Lewis was questioned by police with respect to the instant crimes, he was on probation. (See *Gutierrez, supra*, 58 Cal.4th at p. 1390 ["not every factor will necessarily be relevant in every case" and "if there is no indication in the presentence report, in the parties' submissions, or in other court filings" that a particular factor applies, "then that factor cannot have mitigating relevance"].) The trial court was well aware that it had discretion to sentence Lewis to a lesser term than it had previously imposed and that a de facto LWOP sentence should be reserved for the " 'rare juvenile offender whose crime reflects irreparable corruption.' " (*Miller*, *supra*, 567 U.S. at pp. 479–480.)

The trial court explicitly acknowledged Lewis's expert testimony, which emphasized his exposure to violence, his post-incarceration diagnosis of posttraumatic stress disorder, and the suggestion he was under the influence of drugs or alcohol at the time of the Tibbs murder. The trial court appears to have found these factors of limited use in explaining Lewis's repeated instances of callous and calculating violence. That conclusion is not unreasonable. Lewis's theory that his violence was symptomatic of the trauma he suffered after Williams's death, is refuted by three violent sex offenses he committed *before* that time. Likewise, there is evidence refuting Lewis's suggestion he was under the influence of drugs or alcohol at the time of the murder.

Miller "requires a trial court, in exercising its sentencing discretion, to consider the 'distinctive attributes of youth' and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders' before imposing life without parole on a juvenile offender." (*Gutierrez, supra,* 58 Cal.4th at p. 1361, citing *Miller, supra*, 567 U.S. at [p. 472].) Here, the record shows the trial court, on

remand, considered those factors and answered the question before it—whether Lewis "can be deemed, at the time of sentencing, to be irreparably corrupt, beyond redemption, and thus unfit ever to reenter society, notwithstanding the 'diminished culpability and greater prospects for reform' that ordinarily distinguish juveniles from adults." (*Gutierrez*, at p. 1391.) That Lewis has an alternative view of the evidence does not mean we can second guess the trial court.

Lewis misplaces his reliance on *Padilla*, *supra*, 4 Cal.App.5th 656, review granted. In *Padilla*, the juvenile offender committed special circumstance murder, at age 16, and was sentenced to LWOP under section 190.5, subdivision (b). (*Id.* at pp. 659–660, 663–664.) At a resentencing hearing mandated by *Miller*, he submitted several reports and declarations regarding his immaturity at the time of the offense, his potential for rehabilitation, and his exemplary conduct while in prison. (*Id.* at pp. 660, 669.) The trial court reimposed LWOP. (*Id.* at p. 660.)

In the time between his resentencing hearing and consideration of Padilla's appeal, the United States decided *Montgomery, supra,* 577 U.S. ___ [136 S.Ct. 718]. Thus, the *Padilla* court observed, on review: "*Montgomery* significantly recast *Miller*. Under *Montgomery*, *Miller* must be regarded as announcing a substantive rule barring LWOP terms for a specific class of juvenile offenders, namely, those ' "whose crimes reflect the transient immaturity of youth," ' not irreparable corruption. [Citation.] . . . The application of *Miller* in state collateral review proceedings thus targets a specific question—that is, whether the juvenile offender's crime arose from irreparable corruption, rather than transient immaturity—the focal point of which is the existence of ' "permanent incorrigibility." ' [Citation.] [¶] . . . Only considerations regarding federalism motivated *Miller* to refrain from requiring that trial courts make a finding regarding 'a child's incorrigibility.' [Citation.] . . . [¶] In our view, the stringent standard set forth in *Montgomery* cannot be satisfied unless the trial court, in imposing an LWOP term, determines that in light of all the *Miller* factors, the juvenile offender's crime reflects irreparable corruption resulting in permanent incorrigibility, rather than transient immaturity. . . . In view of *Montgomery*, the trial court must assess the *Miller* factors with

an eye to making an express determination whether the juvenile offender's crime reflects permanent incorrigibility arising from irreparable corruption." (*Padilla, supra,* 4 Cal.App.5th at pp. 672–673, rev. granted, fn. omitted.) Because the trial court had exercised its discretion in resentencing without the benefit of *Montgomery* and had "neither stated that appellant was irreparably corrupt nor made a determination of permanent incorrigibility," the reviewing court reversed and remanded for a new resentencing hearing. (*Id.* at pp. 659, 673–674.)

Assuming for the purposes of argument that *Padilla* was correctly decided, this case is distinguishable. Unlike in *Padilla*, Lewis's resentencing hearing was conducted after *Montgomery* was decided. And the trial court explicitly determined Lewis's crimes were not the result of transient immaturity, that he would present a danger to society if released, and that he is that rare juvenile offender whose crimes reflect irreparable corruption. *Padilla* in no way suggests the trial court abused its discretion.

Miller, *Franklin*, and *Montgomery*, taken together, teach that a 115-year-to-life sentence imposed on a juvenile homicide offender may, in the absence of an appropriate record showing the trial court considered the mitigating factors of the offender's youth, constitute cruel and unusual punishment. Here, however, at the resentencing hearing, the trial court clearly was aware it had discretion, and "[took] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Miller, supra,* 567 U.S. at p. 480, fn. omitted.) LWOP may be "an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the transient immaturity of youth" (*Montgomery*, *supra*, 577 U.S. at p. ___ [136 S.Ct. at p. 734]), but the record before us does not compel the conclusion Lewis falls within that class. The trial court did not abuse its discretion.

III. DISPOSITION

The judgment is affirmed.

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BRUINIERS, J.

WE CONCUR:

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SIMONS, Acting P. J.

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NEEDHAM, J.